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No. 06-923

In the Supreme Court of the United States

METLIFE (METROPOLITAN LIFE INSURANCE COMPANY) AND LONG TERM DISABILITY PLAN FOR ASSOCIATES OF SEARS, ROEBUCK AND COMPANY, PETITIONERS

v.

WANDA GLENN

On Petition For A Writ Of Certiorari To The United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

The Opposition casts no doubt on the urgent need for this Court to resolve the two issues presented. Indeed, respondent essentially admits the existence of circuit conflicts on both issues. Her principal argument against *certiorari* is that this case, in her view, does not provide a suitable *vehicle* for resolving those issues because, even if she lost them here, she has additional bases on which she could urge the Court of Appeals to reach the same result. As we demonstrate below, however, those arguments would neither prevent this Court from reaching the issues presented nor undermine the suitability of this case as a vehicle for resolving them.[1]

I. THE OPPOSITION CASTS NO DOUBT ON THE NEED FOR THE COURT TO RESOLVE THE CIRCUIT CONFLICT OVER "DUAL FUNCTION" CONFLICTS OF INTEREST, OR THE SUITABILITY OF THIS CASE AS A VEHICLE FOR DOING SO.

Respondent concedes that there is a conflict among the circuits over whether the fact that an ERISA administrator is also a plan funder creates a conflict of interest. Opp. 21. She also admits that this conflict is wide, deep and mature. As she notes, eight circuits, "the Third, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth and Eleventh Circuits have essentially held that a dual-role insurer is subject to an inherent conflict to be considered on judicial review," while three circuits, "the First, Second, and Seventh Circuits" have basically held that there is no "inherent conflict" arising from the fact that the insurer plays this dual role. Opp. 21.

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[1] There have been further developments in this case that have no bearing on the petition. On September 1, 2006, the Sixth Circuit remanded the case to the United States District Court for the Southern District Of Ohio, Eastern Division. On remand, the District Court ordered Respondent's benefits reinstated retroactively. *Glenn* v. *MetLife*, 2007 U.S. Dist. LEXIS 1421, (S.D. Ohio Jan. 8, 2007). On February 23, 2007, the Sixth Circuit ordered that the mandate be recalled and stayed until this Court dispenses with the petition.

1. Respondent nevertheless argues that this conflict is not really "implicated in this case" because, in Respondent's view, there is sufficient additional evidence to establish a conflict of interest "under the law of the First, Second, or Seventh Circuits." Opp. 22. Respondent's conclusion is incorrect for three reasons.

First, Respondent does not dispute that the Sixth Circuit did not *rely* upon any of her "additional evidence" in finding a conflict of interest. She does not dispute, for example, that the Sixth Circuit, applying settled Circuit law, found what it called a "conflict of interest" *solely* on the basis of MetLife's "dual function" as funder and administrator. Pet. App. 10a. Nor does she dispute that the Sixth Circuit, again applying settled Circuit law, specifically faulted the district court's decision on the ground that it "does not include any discussion of the role that MetLife's conflict of interest may have played in its decision nor appear to give that conflict any weight," and therefore that the district court failed to give "appropriate consideration" to this alleged conflict. Pet. App. 10a.[2]

Respondent's core argument, then, is that the Sixth Circuit *could* have ruled in Respondent's favor if it had applied the law of the First, Second and Seventh Circuits rather than the settled law of the Sixth Circuit. But that obviously does not mean the conflict is not "implicated" by the decision below, much less eliminate the need for this Court to resolve the acknowledged circuit conflict on this important issue. The most it means is that, if this Court grants certiorari and holds that the approach employed by the First, Second, and Seventh Circuits is correct, Respondent may still have an ar-

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[2] Respondent cites no support for her contention that the many circuits that treat the existence of a "dual function" as tantamount to a conflict of interest are subject to the "limiting conditions" that respondent claims, i.e., that the insurer must *also* "categorically refuse to consider reliable evidence of the beneficiary's treating physician as well as an SSA decision finding the beneficiary 'disabled.'" Opp. 14. In fact, none of the cases cited in the petition imposed any such "limiting condition."

gument—on remand unless this Court expands the questions presented—that the *result* reached by the Sixth Circuit was correct. But againthat is no reason why this Court cannot or should not resolve, in this case, the circuit conflict that Respondent herself acknowledges.

Second, Respondent cannot point to any decisions suggesting that the First, Second or Seventh Circuits would find an actual conflict on the basis of the additional facts she cites–*i.e.*, assisting a claimant to obtain social security benefits or declining to consider an SSA decision or evidence from the claimant's treating physician. For example, she cites no case law suggesting that such facts are even considered as *evidence* of a conflict of interest, much less evidence sufficient to show "a *significant* conflict." Opp. 22 (quoting *Hess* v. *Reg-Ellen Mach*, 423 F.3d 653, 660 (7th Cir. 2005)). Indeed, she offers no analysis of any decisions of the First or Second Circuits in support of her argument. And she cites only one Seventh Circuit case, *Hess*, in which the "additional evidence" of a conflict was the fact that the magnitude of the payment at issue was so large in relation to the entity's assets that it "would impact operating results." The Seventh Circuit, however, carefully distinguished that case from others, similar to this one, involving large insurance companies that would *not* be impacted by the magnitude of the payment. In those cases, the Seventh Circuit has held that the dual status of an ERISA administrator such as MetLife has *no* effect on judicial review. See Petition at 7-8 (citing cases).[3]

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[3] The Seventh Circuit, moreover, has refused to find any "actual conflict" based on evidence analogous to that cited by the Respondent here. See, *e.g.*, *Cuddington* v. *Northern Ind. Public Serv. Co.*, 33 F.3d 813, 816 (7th Cir. 1994) ("Just because the Pension Committee is dominated by NIPSCO employees does not automatically mean that a conflict exists."); *Mers* v. *Marriott Int'l Group Accidental Death & Dismemberment Plan*, 144 F.3d 1014, 1020 (7th Cir. 1998)("We presume that a fiduciary is acting neutrally unless a claimant shows by providing specific evidence of actual bias that there is a significant conflict. The existence of a potential conflict is not

Third, there is no logical reason to treat respondents' "other evidence"--again, assisting a claimant to obtain social security benefits or declining to consider an SSA decision or evidence from a claimant's treating physician—as establishing a conflict of interest. If such facts—which at most show that the administrator was looking for reasons to deny the claim—were sufficient to establish a conflict of interest, a claimant would be able to establish such a conflict in virtually every case in which a disagreement arises. Evidence of an inclination or desire to deny a claim will be found in virtually *every* case in which the claimant is disappointed by the administrator's decision. And, as the Seventh Circuit held in *Hess*, it makes no sense to adopt "a heightened standard of review solely because a corporation or insurer interprets its own plan to deny benefits." 423 F.3d at 659.

2. There can be no doubt that this circuit conflict is desperately in need of resolution. In the eighteen years since *Firestone* v. *Bruch*, 489 U.S. 101 (1989), literally hundreds of judges have devoted hundreds of pages discussing the meaning of one sentence in that decision—a sentence that some believe applies to the situation in which the ERISA administrator is also the plan funder: "[o]f course, if a benefit plan gives discretion to an administrator or fiduciary who is operating under a conflict of interest, that conflict must be weighed as a 'facto[r] in determining whether there is an abuse of discretion.' Restatement (Second) of Trusts 187, Comment *d* (1959)." *Firestone*, 489 U.S. at 115. As demonstrated in the petition, the circuits have virtually all attempted but failed to settle on a common interpretation of

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enough.")(citation omitted); *Leipzig* v. *AIG Life Ins. Co.*, 362 F.3d 406 (7th Cir. 2004); *Rud* v. *Liberty Life Assurance Co.*, 438 F.3d 772 (7th Cir. 2006); *Davis* v. *Unum Life Ins. Co.*, 444 F.3d 569 (7th Cir. 2006); *Van Boxel* v. *Journal Co. Employees' Pension Trust*, 836 F.2d 1048, 1051, 1053 (7th Cir. 1987).

that sentence. Several decisions have urged this Court to resolve the issue.[4]

Resolution of the circuit split is also urgently needed as a matter of simple fairness. As noted in the petition, Congress specifically provided that ERISA administrators could serve in dual capacities. Pet. 10-11. However, as a result of the present circuit conflict, administrators of national benefit plans that are also plan funders face different standards, sometimes even for the *same* benefit decision Depending upon the circuit in which the benefit decision is reviewed, the dual status of an ERISA administrator may have no effect[5], may be considered as evidence of a conflict of interest[6], may change the standard of review[7], may change the burden of proof[8], or may make the administrator's benefit decision presumptively void[9]. Thus, similar benefit decisions are approved in one circuit and overturned in others, solely on the basis of the dual relationship specifically authorized in the statute.

This is no small matter. MetLife alone processes more than 290,000 disability claims per year, and desperately

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[4] *E.g., Mario* v. *P & C Food Mkts.*, 313 F.3d 758, 763 n.3 (2d Cir. 2002) (noting that "[t]he correctness—and wisdom—of the *Firestone* decision . . . has been cogently challenged by the country's leading ERISA scholar); *Pinto* v. *Reliance Standard Life Ins. Co.*, 214 F. 3d 377, 383 (3rd Cir. 2000); *Pagan* v. *NYNEX Pension Plan*, 52 F. 3d 438, 442 (2nd Cir. 1995); *Wallace* v. *Reliance Standard Life Ins. Co.*, 318 F. 3d 723, 724 (7th Cir. 2003).

[5] *Wright* v. *R.R. Donnelley & Sons Co. Group Benefits Plan*, 402 F. 3d 67, 74-5 (1st Cir. 2005).

[6] *Elliott* v. *Metro. Life Ins. Co.*, 473 F.3d 613, 621 (6th Cir. 2006).

[7] *Carolina Care Plan, Inc.* v. *McKenzie*, 467 F.3d 383, 386 (4th Cir. 2006).

[8] *Fought* v. *UNUM Life Ins. Co. of Am.*, 379 F.3d 997, 1006-7 (10th Cir 2004), *cert. denied*, 544 U.S. 1026 (2005)

[9] *Brown* v. *Blue Cross & Blue Shield of Ala., Inc.*, 898 F.2d 1556, 1566-67 (11th Cir. 1990).

needs a resolution of this issue so that it knows how properly to manage its massive benefits business.[10] Other large plans are similarly affected. See, *e.g.*, Brief of American Council of Life Insurers in No. 05-1424, *MetLife* v. *Hawkins-Dean* , at 9-15.

Moreover, as two scholars recently put it, "[t]he fact that different judges . . . ., still disagree about what *Firestone* requires, reinforces the drastic need to clarify and simplify this chaos." Donald Bogan & Benjamin Fu, *No Further Inquiry into a Conflicted Plan Administrator Claim Denials*, 58 Okla. L. Rev. 637, 655 (2005). But because the circuits are entrenched in their positions,[11] only this Court can resolve the conflict. This case provides a good vehicle with which to do so.

II. THE OPPOSITION CASTS NO DOUBT ON THE NEED TO RESOLVE THE CONFLICT OVER AN ERISA ADMINISTRATOR'S DUTY TO ADDRESS IN ITS DECISION AN SSA DISABILITY AWARD, OR THE SUITABILITY OF THIS CASE AS A VEHICLE FOR RESOLVING THAT ISSUE.

Respondent also does not dispute the petitioner's explication (at 16-19) of the circuit conflict as to whether an ERISA administrator must address a contrary SSA award in its written benefit decision. Nor does Respondent dispute the depth or maturity of that conflict, with the Eight, Ninth, and D.C. Circuits holding that an adverse SSA award need not be addressed in an ERISA administrator's benefit decision, and the First, Second and Sixth Circuits holding that such an award

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[10] 2004 U.S. Group Disability Sales and In Force Survey, LIMRA International.

[11] Indeed, the Sixth Circuit recently reiterated its holding in this case that less deferential review applies when an ERISA administrator is also a plan funder. *Elliott* v. *Metro. Life Ins. Co.*, 473 F.3d 613, 621 (6th Cir. 2006) ("In *Glenn*, we observed that 'MetLife is authorized both to decide whether an employee is eligible for benefits and to pay those benefits. This dual function creates an apparent conflict of interest.' MetLife is under the same apparent conflict of interest here as it was in Glenn.") (citation omitted).

must be addressed if the administrator wishes to avoid having its decision second-guessed as arbitrary and capricious.

1. Respondent argues that because MetLife asked Respondent to file an SSA claim, referred her to an SSA attorney and benefited from reimbursement for dual benefits, there is a "penumbra of judicial estoppel" which makes it arbitrary and capricious for the administrator subsequently to deny that the claimant is fully disabled. Opp. 15. Respondent, moreover, agues that MetLife's own participation in the SSA proceeding sufficiently distinguishes this case from those that have held that an administrator need not address a prior SSA decision in a benefits decision under an ERISA plan. Respondent is mistaken for two reasons.

First, contrary to Respondent's argument (at 14), the Sixth Circuit's holding here was not "limited" to the situation in which an administrator "require[d], assist[ed] or encourage[d] a beneficiary to obtain SSA benefits." To the contrary, in its conclusion that the administrator's decision was arbitrary, the decision below treated this assistance as a *separate* "factor" from the bare fact that MetLife had "failed to address Social Security's contrary determination of Glenn's status." Pet. App. 11a. Under the decision, the latter fact could have been a *sufficient* basis for a finding of arbitrariness, without MetLife's participation in the SSA proceeding.

Second, Respondent cites no evidence that any of the other cases cited in the petition on this issue turned on the existence *vel non* of the administrator's participation in the SSA proceedings. Thus, respondent has failed to show that the decision below is fairly distinguishable from other decisions effectively requiring an administrator to address an adverse SSA determination.

2. To the extent the Sixth Circuit agreed with the Seventh Circuit's "judicial estoppel" theory, moreover, that only heightens the need for this Court's review. This Court struck down a similar "presumption of judicial estoppel" regarding the SSA and the Americans with Disabilities Act in *Cleveland*

v. *Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 802 (1999) ("despite the appearance of conflict that arises from the language of the two statutes, the two claims do not inherently conflict to the point where courts should apply a special negative presumption"). As in *Cleveland*, there is no place in this area for judicial estoppel because the standards for disability are different under the Social Security Act and the ERISA plan.

Judicial estoppel is also inappropriate in this case because the medical records on which MetLife relied differed substantially from those present in the SSA appeal.[12] Courts have treated such differences as dispositive. For example, in *Block* v. *Pitney Bowes, Inc.*, 952 F.2d 1450, 1455 (D.C. Cir. 1992), the court stated that "[t]he Social Security award . . . rested at least in part on medical reports never submitted to the Committee. Courts review ERISA-plan benefit decisions on the evidence *presented to* the plan administrators. . . ." (emphasis added).[13]

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[12] Indeed, the Sixth Circuit noted one of the records falling into the former category: "the record before the [SSA] administrative law judge did not include the report, signed on the same day that the administrative judge's decision was made, in which Dr. Patel answered 'yes' to MetLife's question, 'Do you believe Ms. Glenn is able to work in a sedentary physical exertion level occupation?'" Pet. App. 14a. In addition, Respondent admits that, in making its disability decision, the SSA relied on medical records that were never provided by Respondent to MetLife. Opp. 5 For example, in support of her appeal before the SSA, Respondent submitted 23 medical reports, assessments or analyses. (J.A. 338) Of those 23 exhibits to the SSA record, Respondent did not provide 13 of those records to MetLife, including 6 that were specifically referenced or commented upon in the ALJ's final determination that Respondent was totally disabled from any occupation. (J.A. 331-336).

[13] Respondent also argues that MetLife was conflicted because it allegedly did not *consider* the SSA award before making its final decision. However, the record is undisputed that, before its final benefit determination, MetLife was aware of the SSA award, received a copy of the SSA award from Respondent's attorneys (J.A.

In short, Respondent has offered no plausible response to our showing that *certiorari* is warranted on the second issue presented, and that this case is a good vehicle with which to resolve that issue.

III. RESPONDENT'S ARGUMENT THAT THE SIXTH CIRCUIT WOULD HAVE FOUND A CONFLICT OF INTEREST WITHOUT ITS OTHER ERRORS LIKEWISE MISSES THE POINT.

Respondent also argues that the Sixth Circuit would have reached the same result based solely on the contrary medical evidence or on other factors besides those in the two questions presented, and argues that this too counsels against a grant of *certiorari*. Here again, respondent is wrong.

First, as noted, the Sixth Circuit clearly reached holdings on these two questions. As the Circuit stated "we are entitled to take into account the existence of a conflict of interest that results when, as in this case, the plan administrator who decides whether an employee is eligible for benefits is also obligated to pay those benefits and to factor in the plan administrator's failure to give consideration to the Social Security Administration's determination that Glenn was totally disabled." Pet. App. 10a. Similarly, the Circuit stated, "the court's analysis of the plan administrator's basis for terminating benefits does not include any discussion of the role that

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167-169, 327), and discussed the SSA award with Respondent on the telephone. J.A. 172. Indeed, respondent specifically asked MetLife to explain the SSA decision, at which time it was explained to her that MetLife reached a different decision because its decision was based on all the information MetLife had received. *Id.* She was told that "if she feels that any information used by the SSA to reach a decision should be part of her appeal, she should include it with her written appeal." *Id.* One week later, Respondent wrote to MetLife appealing the denial of her claim and enclosing some, but not all, records pertaining to the SSA appeal. J.A. 204. The record reflects that MetLife received her letter and considered all information contained in its file, including the SSA decision, before denying her appeal. (J.A. 173-176).

MetLife's conflict of interest may have played in its decision nor appear to give that conflict any weight. It appears to us, as a result, that this factor did not receive appropriate consideration by the district court. . . . There is yet another factor [the SSA award] that the district court appears to have given inadequate consideration." Pet. App. 10a.

Once again, then, Respondent is trying to avoid review of the two questions presented by claiming, in essence, that there is or might be on remand an alternative ground for affirmance. And once again, the fact that there might be such an alternative ground is not relevant to this Court's decision on *certiorari*. It would be relevant, if at all, on remand, *after* a decision by this Court on the merits. The fact that Respondent might be able to argue on remand that the Sixth Circuit reached the right result based on other factors does not prevent this Court from reaching the issues presented. Nor does it lessen the need for review or the suitability of this case as a vehicle for resolving the issues presented.

In summary, there is no question that the present *effect* of the Sixth Circuit's decision and others like it is (a) to discourage companies from playing the very dual-use function that Congress contemplated, and (b) to effectively require them to address SSA determinations if they do not wish to run a serious risk of having their decisions overturned by the courts. Review is needed, therefore, not so much to change the result in this particular case (although that will be the likely result), but to resolve the intolerable conflicts in the law and thereby give administrators better guidance for future cases. This case provides an excellent vehicle with which to do just that.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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